

State of California  
Department of Industrial Relations  
DIVISION OF WORKERS' COMPENSATION  
455 Golden Gate Avenue, 9th Floor  
San Francisco, CA 94102

**NOTICE OF EMERGENCY REGULATORY ADOPTION**

**Finding of Emergency and Informative Digest**

**Subject Matter of Regulations: Workers' Compensation – Collective Bargaining  
Agreements**

The Administrative Director of the Division of Workers' Compensation ("DWC"), pursuant to the authority vested in him by Labor Code Sections 59, 133, 3201.5, 3201.7, 3201.9, and 5307.3, proposed to amend Chapter 4.5, Subchapter 1.8, of Title 8, California Code of Regulations, commencing with Section 10200. This action is necessary in order to implement, on an emergency basis, the provisions of Labor Code Section 3201.7, as adopted by Senate Bill 228 (Chapter 639, Stats. of 2003, effective January 1, 2004).

**Finding of Emergency**

The Administrative Director finds that the proposed regulations attached hereto are necessary for the immediate preservation of the public peace, health and safety or general welfare.

**Statement of Emergency**

Labor Code Section 3201.7, as adopted effective January 1, 2004, allows unions and employers who have a collective bargaining relationship to agree on, through negotiations, a "labor-management agreement" that may establish: (1) an alternative dispute resolution process in place of existing procedures required under the Labor Code; (2) an exclusive list of medical providers and medical-legal evaluators; (3) joint labor-management safety committees; and (4) an exclusive list of vocational rehabilitation providers. The statute gives the parties considerable flexibility in designing the agreement, which is generally referred to as a "carve-out" program. However, regardless of its final negotiated provisions, the agreement cannot diminish compensation to injured workers and must provide for review of the final step of the agreed alternative dispute resolution process by the Workers' Compensation Appeals Board ("WCAB") and, ultimately, the California Court of Appeal.

Senate Bill 228 deleted the previous versions of Labor Code § 3201.7, which allowed unionized employers exclusively in the timber and aerospace industries to establish carve-out programs, and adopted the new Section 3201.7, which removes the industry restriction and allows unionized employers in any industry, meeting specified financial eligibility requirements, to establish a carve-out program. The new statute will operate alongside the existing Labor Code § 3201.5, the carve-out statute applicable solely to the construction industry.

The new Section 3201.7 is not self-executing; regulations are necessary to implement the statute. Subdivision (d) requires the carve-out process to be initiated by a union filing a petition for permission to negotiate with the Administrative Director. The subdivision is very specific as to the information that must be provided by the union: the bargaining units to be included, the name of the employer or group of employers, and proof of the union's status as the exclusive bargaining representative for the employees. However, subdivision (d) expressly requires that the petition "shall be in the form designated by the administrative director." This requirement imposes upon DWC, at minimum, the obligation to draft a petition form and/or regulation advising unions as to the format in which the necessary information must be submitted. The insertion of a form requirement precludes DWC from accepting letters or other types of requests (a legal document drafted by a law firm) asking for permission to negotiate a carve-out program, regardless of the fact that all necessary documentary information has been provided with the letter/request.

It is necessary for DWC to immediately implement Section 3201.7. The costs of supporting the workers' compensation system have been identified as contributing to the serious economic crisis facing California's employers. Employers, in conjunction with the unions with whom they have collective bargaining relationships, can gain greater control over spiraling medical and litigation costs by utilizing carve-out agreements that have an exclusive list of medical providers and a structured alternative dispute resolution system, separate and apart from the WCAB. Employees will benefit by efficiently delivered medical treatment, an agreed list of providers will result in fewer medical determinations challenged by their employers, and by having disputes resolved in a timely fashion. An established alternative dispute resolution system, either utilizing mediation or arbitration (or both) will expedite challenges to both coverage and medical determinations. Considering the current crises in workers' compensation, employers and employees should be able to immediately avail themselves of the benefits offered by this reform legislation. Adoption of the proposed regulations as soon as possible is therefore necessary for the immediate preservation of the public peace, health and safety or general welfare.

### **Authority and Reference**

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code Sections 59, 133, 3201.5, 3201.7, 3201.9, and 5307.3.

Reference is to Labor Code Sections 3201.5, 3201.7, and 3201.9.

### **Informative Digest**

These regulations are required by a legislative enactment - Statutes of 2003, Chapter 639.

Section 3201.7 of the Labor Code, as adopted by Senate Bill 228, allows "labor-management agreements," or "carve-out" programs to be negotiated by employers (in any industry) and unions with whom the employers have existing collective bargaining relationships. Similar to Labor Code § 3201.5, which allows carve-out programs in the construction industry, the Section 3201.7 labor-management agreement may include an alternative dispute resolution system (final

decisions are subject to WCAB review), an agreed list of medical providers, an agreed list of qualified or agreed medical evaluators, the creation of a joint safety committee, the creation of a return to work program, the creation of a vocational rehabilitation program with an agreed list of rehabilitation providers. Section 3201.7(a)(3). Unlike Section 3201.5, employees subject to a Section 3201.7 agreement have the right to representation by counsel at all stages during the alternative dispute resolution process. Section 3201.7(b).

To establish such a program, Section 3201.7 requires unions to first petition the Administrative Director for permission to negotiate a carve-out program. The petition must include the bargaining units to be included, the name of the employer or group of employers, and proof of the union's status as the exclusive bargaining representative for the employees. The petition must be in "the form designated by the administrative director." Section 3201.7(d). When the union's status as the exclusive bargaining representative is verified, the Administrative Director shall issue a letter advising the union and employer of their eligibility to enter into negotiations for the purpose of establishing a carve-out program. Employers who have annual workers' compensation premiums of \$50,000 or more and have 50 employees are eligible to establish a carve-out program under Section 3201.7. Groups of employers, which may include cities and counties, must have premiums of \$500,000 or more. Section 3201.7(c). The parties may negotiate for a period of one-year, but can ask for an extension of an additional year. Section 3201.7(d).

When a carve-out agreement is reached, Employers must provide the Administrative Director with the carve out agreement, the number of covered employees, a statement that no action has been taken by an administrative agency or court to invalidate the carve-out agreement, a contact person, and any other information the Administrative Director finds necessary to implement Section 3201.7. Section 3201.7(e). Unions must provide their current LM-2 filing with the U.S. Department of Labor and their respective contact person. Section 3201.7(f).

Similar to Section 3201.5, the Administrative Director has the authority to require Section 3201.7 programs to provide data on, among other things, the number of claims filed, the average cost of claims, the number of contested and litigated claims, and the number of workers participating in established return to work or vocational rehabilitation programs. Unlike Section 3201.7, the Administrative Director must provide information on "overall worker satisfaction." Section 3201.7(h).

The Administrative Director now proposes to adopt administrative regulations recognizing carve-out agreements for employers in all industries. These proposed regulations implement, interpret, and make specific Section 3201.7 of the Labor Code as follows:

1. Section 10200.

This section provides definitions for key terms relating to carve-out programs under Sections 3201.5 and 3201.7 to ensure that their meaning will be clear to the regulated public. The key terms include:

(a) “Employee” is defined as employee covered under either a Section 3201.5 or 3201.7 carve-out agreements.

(b) “Employer” is defined as either a construction employer, for the purpose of applying Section 3201.5, or a private employer, group of employers, or a city or county that is self-insured in compliance with Labor Code section 3700, for the purpose of applying Section 3201.7.

(c) “Labor-management agreement” is defined to mean a carve-out program established under Section 3201.7.

(d) “Union” is defined as a bona fide labor organization that is the recognized or certified exclusive bargaining representative of the employees of an employer. A union is bona fide if it: actually represents employees in California as to wages, hours, and working conditions; has officers elected by secret ballot or otherwise in a manner consistent with federal law; and (3) is free of domination or interference by any employer and has received no improper assistance or support from any employer.

## 2. Section 10201.

The section sets forth the procedure for recognizing carve-out programs under Section 3201.5. The proposed amendments seek to incorporate the existing Section 10202, addressing the effect of a letter of eligibility issued under Labor Code § 3201.5, into Section 10201. Unlike Labor Code § 3201.5(d), the new Labor Code § 3201.7 does not have a provision requiring the Administrative Director to issue a “letter of eligibility” to carve-out programs that meet the eligibility requirements of the statute. The proposed amendments seek to clarify that letters of eligibility only apply to construction carve-out programs under Labor Code § 3201.5. The proposed amendments to Section 10201 also include two new provisions: (1) subdivision (f), setting forth the procedure to renew letters of eligibility; and (2) subdivision (g), which clarifies that carve-out programs must comply with other requirements of the Labor Code that are unaffected by Section 3201.5. These include the audit provisions of Labor Code § 129, the benefit notice provisions of Labor Code § 138.4, and the Workers’ Compensation Information System mandate of Labor Code § 138.6.

## 3. Section 10202.

The proposed amendments delete the existing Section 10202 and adopt a new Section 10202, which sets forth the procedure for recognizing carve-out programs under Section 3201.7. Included in the new regulation are:

- The procedure for initiating the negotiation procedure. Subdivision (a) requires a union to submit the “Petition for Permission to Negotiate a Section 3201.7 Labor-Management Agreement” form (DWC Form RGS-1), as contained in Section 10202.1. Subdivision (b) sets forth the procedure whereby the Administrative Director issues a letter of eligibility to negotiate a 3201.7 provision. Subdivision (c) provides that the letter of eligibility to

negotiate shall remain valid for a period not to exceed one year from the date of issuance, unless an extension is requested.

- The documents that must be submitted to the Administrative Director by an employer, or group of employers, for a carve-out program to be recognized under Labor Code § 3201.7. Under subdivision (d)(1) employers must submit: a copy of 3201.7 provision, and the approximate number of employees who will be covered; a statement that no action has been taken by any administrative agency or court of the United States to invalidate the collective bargaining agreement; the contact person; evidence of valid business license; financial eligibility information; and a statement it is willing to provide claim information as required by Labor Code § 3201.7(h). Groups of employers must submit additional information stating that each individual member of the group meets the requirements of Labor Code § 3201.7.
- The documents that must be submitted to the Administrative Director by the union for a carve-out program to be recognized under Labor Code § 3201.7. The union must provide their LM-2 or LM-3 filing with the United States Department of Labor, and the name of a contact person.
- A provision allowing anyone to submit documents to the Administrative Director that bear on the application of the union and employer, or group of employers. Copies of all such documents received shall be sent to the union and employer, or group of employers, for comment.
- The requirement that every member of a group of employers must maintain separately administered workers' compensation insurance or a self-insurance program distinct from all other types of insurance.
- The procedure for the Administrative Director to review and recognize carve-out agreement under Labor Code § 3201.7. The Administrative has 30 days, following the submission of a complete application, to either recognize the carve-out agreement or deny the application.
- A provision setting forth the effect of the Administrative Director's recognition. The recognition of the Section 3201.7 provision is a determination by the Administrative Director that the parties meet the eligibility requirements of Labor Code section 3201.7. A 3201.7 provision is valid and binding only if there was a complete application filed with the Administrative Director at the time of injury.
- A provision clarifying that carve-out programs must comply with other requirements of the Labor Code that are unaffected by Section 3201.7. These include the audit provisions of Labor Code § 129, the benefit notice provisions of Labor Code § 138.4, and the Workers' Compensation Information System mandate of Labor Code § 138.6.

3. Section 10202.1.

This section adopts the Petition for Permission to Negotiate a Section 3201.7 Labor-Management Agreement (DWC Form RGS-1), as required by proposed Section 10202(a).

4. Section 10203.

The proposed regulations amend the existing Section 10203, which required construction carve-out programs to report specific claim data pursuant to Labor Code § 3201.5(i). The regulation is amended to:

- Require Labor Code § 3201.7 carve-out programs to report similar data, pursuant to Labor Code § 3201.7(h).
- Require claim information for the first mandatory reporting year, and then for next three calendar years as they occur, as required by Labor Code § 3201.9.
- Provide that the information required under the regulation be: (1) submitted on a form prescribed by the Administrative Director; or (2) submitted directly by the claims administrator (after written authorization from the employer).
- Require additional program information, including the certificate number of self-insured employers, the stages of the alternative dispute resolution system that exist instead of or in addition to arbitration and mediation, and an employee survey measuring worker satisfaction (Section 3201.7 programs only).
- State that employers are subject to the reporting requirements of the Workers' Compensation Information System.

5. Section 10203.1.

This section adopts the Aggregate Employer Annual Report (DWC Form GV-1), as required by proposed Section 10203(a)(2)(A).

6. Section 10203.2.

This section adopts the Individual Employer Annual Report (DWC Form GV-2), as required by proposed Section 10203(a)(2)(A).

7. Section 10204.

This section currently requires construction carve-out programs recognized under Section 3201.5 to annually submit updates to their initial application, and provides that a program's letter of eligibility may be revoked if the program fails to submit either the updates required by this section or the claim information required by Section 10203. The proposed regulations seek to

amend the section by also imposing the requirements on programs recognized under Section 3201.7.

**Matters Prescribed By Statute Applicable To The Agency Or To Any Specific Regulation Or Class of Regulations.**

There are no other matters prescribed by statute applicable to the Division of Workers' Compensation or to any specific regulation or class of regulations.

**Mandate On Local Agencies Or School Districts**

The Administrative Director has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district.

**Fiscal Impacts**

Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None.

Other nondiscretionary costs/savings imposed upon local agencies: None.

Costs or savings to state agencies or costs/savings in federal funding to the State: None.

Adoption of this regulation is a statutory mandate and its emergency adoption is required in part by the severe revenue and budgetary shortfalls facing California state government for the current and upcoming fiscal years.